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Nancy Hilding to STB staff,

Hi Victoria Rutson gave me this fax number to send comments on the DM&E Railroad extension project.

I am faxing these comments.

Earlier tonight before midnight June, 6<sup>th</sup>, I sent both letters via the electronic filing mechanism on the web. I sent them in two different electronic sendings several hours apart.

Just to be sure they got there, I am now sending by fax.

When I sent them via e-mail I sent from a Macintosh computer and I saved as a MSW file and an RTF file and sent you both MSW and RTF files. I imagine you can open them, but as I have a Mac, I am sending these faxed copies to.

Thanks

Nancy Hilding  
4 pages follow

to  
202 - 565 - 9000

Nancy Harding  
6900 West Elm  
Black Hawk, SD 57718  
June 6, 2005

Case Control Unit  
Finance Docket No. 33407  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001

Attention: Victoria Ratson - Section of Environmental Analysis

Below find my first comment letter. I will send several letters in, in sequence. -- Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB -- Finance Docket No. 33407.

**-- STB RULING ON "TRANSPORTATION MERITS" BEFORE ROD ON THE FEIS/SEIS VIOLATES NEPA.**

The policy of the STB to decide on "the transportation" merits before the NEPA process is complete is a violation of NEPA. This SEIS is erroneously tied to the "1998 Decision", which decision in my opinion is the result of a process which violates NEPA, as I will explain below.

Further more the SEIS keeps on saying that the "1998 Decision" is about the "transportation merits", however 49 USC 10901 requires the STB to find that the rail project is not inconsistent with the public convenience and necessity, the public convenience and necessity, is more than "transportation merits" to me.

The CEQ regulations at 40 CFR Ch V. 1508.14 define the Human environment as follows:

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment (See the definition of "effects" (1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment. ((40 CFR Chapt V. 1508.14)

Unfortunately the STB believes it can separate out "transportation issues" from "environmental issues".

"This subtitle provides for issuance of a decision within 180 days of the effective date of this decision that will address the transportation issues relating to this construction application and whether the proposal satisfies the criteria of 49 U.S.C. 10901. Any approval would be conditioned upon completion of the environmental review process and consideration of environmental issues, which would be considered in a final decision on whether to authorize the construction." (page 1, Surface Transportation Board Decision on STB Finance Docket No. 33407, May 7, 1998)

The factors the STB is supposed to use to decide on whether a rail project is not inconsistent with the public convenience and necessity are economic and social effects and belong within the EIS process. How can you know what mitigation will be required until you do the EIS? If you don't know what mitigation is required, you don't know how much the project will cost? If you don't know how much the project will cost, how can you determine that the railroad can afford it or what rates the railroad must charge per mile traveled or how much cheaper its transportation rates will be? If you haven't examined all the negative impacts, as well as positive benefits, with full public input and review, how can you decide that it is not inconsistent with the public convenience and necessity?

The STB with their "cart before the horse" legal proceedings, force a decision without the information on the project and its impacts disclosed that were disclosed in the FEIS and SEIS. In a proper NEPA process you must review all impacts including socio-economic (transportation) impacts before you can conclude that DM&E project will not inconvenience the public and will satisfy the criteria of 49 U.S.C. 10901.

If there is a conflict between your regulations and NEPA or the Council on Environmental Quality regulations (CEQ), NEPA and the CEQ regulations take precedence. By making a conditional decision on these issues prior to completing NEPA you violate the following provisions of the Council on Environmental Quality regulations:

(1) Analysis must be performed before the decisions are made and actions taken and public comment must be an essential part of NEPA:

"NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken" (40 CFR 1500.1(b))

(2) The CEQ regulations say a major federal action can't be taken that will prejudice the ultimate decision:

"(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (1506.1)" (40 CFR Ch. V 1502.2 (f))

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of the proposed agency actions, rather than justifying decisions already made" (40 CFR Ch. V 1502.2 (f) & (g)).

40 CFR Ch. V 1506.1 (c) says:

"While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action...

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives."

When the STB decided that the DM&E's application was "not inconsistent with the public necessity and convenience" you made a decision about some relative benefits/harms of impacts of the project and about limiting the range of mitigation costs (ie- you have decided what DM&E can afford to spend ) before the DEIS is made.

The STB is required to develop the EIS and other planning documents simultaneously. 40 CFR Ch. V. 1501.2 says:

"Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analysis. Environmental documents and appropriate analysis shall be circulated and reviewed at the same time as other planning documents.

1508.23 Proposal.

"Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.(40 CFR Chapt V. 1508.23)

I believe that a STB decision that the DM&E proposal is "not inconsistent with the public necessity and convenience" is a recommendation or report on the proposal that was made before the EIS was completed. According to CEQ regulations; adjudication, such as the STB proceedings in 1998, can't happen until after the EIS. Preliminary hearings are just supposed to cover what should be in the EIS. 40 CFR Ch. V 1502.5 says:

"An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (1509.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made (1500.2(c), 1501.2 and 1502.2)....

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearing designed to gather information for use in the statements." (40 CFR Ch. V 1502.5)

Sincerely, Nancy Hilding

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Attention: Victoria Rotson - Section of Environmental Analysis

Below, find my second comment letter. I am sending two letters in, in sequence. This is the second letter and a continuation of my first letter on this DSEIS and it is related to the first letter -- Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB -- Finance Docket No. 33407.

#### SPECIFICS - MORE COMMENTS ON THE DSEIS

##### Range of Alternatives:

The DSEIS discusses 4 issues (horn noise, noise and vibration synergism, air quality and "Programmatic Agreement"). It does not analyze mitigation effects for these 4 issues for each of the alternatives. Why is that?

On page 4-17 it discusses 4 scenarios that were studied. How do these scenarios relate to the various alternatives discussed in the FEIS? Are any of the scenarios the equivalent of the "No Action" Alternative? If not, why have they created an analysis and scenarios not related to the alternatives in the FEIS?

##### Economics:

The "1998 Decision" is based on assumptions that rail rates were going to increase. The April 2005 DSEIS states "the NEMS model assumes a continuation of the historical downward trend of coal transportation rates over the NEMS forecast period."... "Therefore, the addition of the DM&E routes may be implicitly included in the downward transportation rate trend" In the DSEIS you have declining rates which is contrary to the 1998 Decision and changes the economics. Plug this scenario into table III of the 1998 Decision and run it out to 2025 and maybe you may discover this project could be a financial disaster.

For Revenue projections the rate of return goes up. For the Air Quality projections the model presupposes that the rate projections goes down. The STB cannot have it both ways. Which projections reflects reality? If the analysis and data change depending on what point you are arguing, is this NIS/NEPA process merely justification of a decision already made and thus a violation of the CEQ regulations?

Although it is now 2005, some of the economic data used is 7 years old; the study to determine average mileage savings to plants in DM & E's core markets are predicated on the 1998 decision and on the 2002 projected rates for UP and BNSF (and is derived from the 1998 Decision). There are many NEPA requirements about high quality scientific review. And this DSEIS, whenever it fails to update its economic data, violates the following:

- a. Failure to obtain the information necessary to assess impacts to the human environment (40 CFR 1500.1 (b), 1502.1, 1502.15, 1502.22)
- b. Failure to analyze and disclose direct, indirect, and cumulative impacts with scientific and professional integrity (40 CFR 1502.16, 1502.24)

##### Air Quality and Economics

We question again the relevance of the DM&E project to the public necessity or convenience. Why would the public want a new rail line except that it brings new products/service to new areas, improves frequency of resupply/supply of products/service or reduces the price the public pays for old products/service it always got.

The DSEIS conclusion in the air quality section is that the DM&E railroad won't have much effect on air quality because the railroad expansion won't change the amount of coal burned significantly. The DM&E is being sold as a coal railroad to deliver coal, if it doesn't effect the amount of coal burned, then we question if the rail line will bring new products (coal) to new areas? If we, the public, pay less for electricity, won't we waste it more or buy more electricity because it is cheaper and conversely if the price is higher won't we conserve electricity more and buy less?

Thus if the public's consumption of coal doesn't increase, then doesn't a smart person question whether the DM&E railroad will have any effect on the price the consumer pays for coal or electricity? Are we the public being sold a hoaxologic rail line that will split up and degrade our communities, create noise and traffic congestion and ruin wild places, merely for the greed/profit of railroad investors or utility company owners?

If coal consumption isn't effected then how does the public profit from this railroad?

While the writers of the SEIS are writing about the 4 coal transportation rate scenarios and related air quality scenarios, why don't they do a projection of consumer price paid for electricity in each scenario? This separation of environmental effects and economic effects is the fault of the STB process that reaches a decision on "Transportation merits" separate from and before the environmental merits. There should be some attempt to match compare which public sees the negative environmental costs and which public sees the benefits, if any.

#### Air Quality

When looking at various air quality models, the DSEIS writers appear to have chosen the air quality model because they could get it for free, not necessarily because it was the best model. I join with Powder River Basin Resource Council in questioning the choice of air quality models. "After carefully assessing existing computer models" EPA selected the National Energy Modeling System "since EPA agreed to run the model for the Board at no cost in this case".

I think there should more data about possible local effects on air quality. The writers of the DSEIS dilute the effects of the project by viewing all air quality impacts on a national or regional scale. How many projects undertaken by the government and studied under NEPA would appear significant if looked at under a national perspective, instead of locally? People do not breath "national" air, they don't get sick from "national" air, their health and quality of life are derived primarily from the air quality in the location that they live and work in. Regional air quality may have some effect on local air quality, but local sources are most important.

Shouldn't one of the indirect air quality effects, be the mining of coal in the Powder River Basin on regional/local air quality. I see no discussion of that in the DSEIS, just coal burning effects. But coal mining must create at least particulate matter from mining activities, which dusty air must exist in synergism/cumulative effects with all the air quality impacts derived coal bed methane development.

#### Noise

What are "noise sensitive receptors"; are these just people, or people and animals, or people/animals/machines/scientific equipment etc?

The SEIS points out that thousands of people (8,943 noise sensitive receptors in Minnesota and 3,945 noise sensitive receptors in SD) will experience noise levels of 70 dBA L(dn) due to horn soundings, but most of the mitigations mentioned for horn noise in chapter 2 are seen by writers of DEIS as too expensive for the railroad to afford. If the necessary noise or noise and vibration mitigation can't be afforded, and about 12,000 "noise receptors" will be negatively effected without mitigation or without meaningful mitigation, maybe the DM&E was premature in deciding that the project is "not inconsistent with the public convenience and necessity?" There is also the public inconvenience of waiting at railroad crossings for trains to pass or communities having to fund bridges to restore traffic flow..

If the local community or homeowner has to pay to build the mitigation for sound and also for traffic congestion then isn't the DM&E and the STB hiding the true cost of the railroad in new financial burdens or loss of property value of innocent people and communities along the way. This is asking other private or public entities to pay the true costs of a private project; it's a manipulative way for private corporations to make profit off the backs of other.

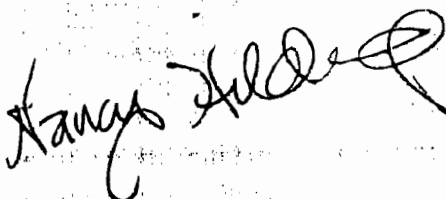
The DSEIS stresses negotiated settlements between railroad and communities as a solution, however as the alternative to negotiation is the mitigation provided by the FEIS, and the DSEIS doesn't provide for sound mitigation, what negotiating power/leverage do communities have on this issue?

#### Noise and Vibration Synergism

The DSEIS does not provide a very compelling discussion on this point, it sounds like they don't understand this issue.

Thanks,

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